No. 34

Edmund L. Udall, Secretary of the Interior, Petitioner,

vs.

James K. Tallman, et al., Respondents.

On Certiorari to the United States Court of Appeals for the District of Columbia.

MOTION OF RICHFIELD OIL CORPORATION AND STANDARD OIL COMPANY OF CALIFORNIA FOR LEAVE TO FILE BRIEF AS AMICI CURIAE

AND

AMICI CURIAE BRIEF IN SUPPORT OF PETITIONER

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1964

No. 34

STEWART L. UDALL, SECRETARY OF THE INTERIOR,
Petitioner,

VS.

JAMES K. TALLMAN, ET AL.,
Respondents.

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE

Richfield Oil Corporation and Standard Oil Company of California respectfully move this Court for leave to file, as amici curiae, the attached brief in support of the petitioner. Consent to the filing of said brief has been given by petitioner, but respondents have refused their consent.

Leave is requested on the following grounds:

I

This Court granted applicants' motion for leave to file an amici curiae brief in support of the petition for certiorari, and applicants filed such a brief.

II

Applicants hold oil and gas leases issued by the petitioner covering most of the lands in the Kenai National Moose Range on which respondents seek leases from petitioner. Applicants also hold most of the oil and gas leases on lands in the Kenai National Moose Range which produce or are known to be capable of producing oil in commercial quantities. In addition, applicants hold many other oil and gas leases on lands in the Kenai National Moose Range which remain to be explored for oil and gas.

Prior to the decision of the Court of Appeals, applicants had spent over $45,000,000 in the development of the oil and gas deposits in Kenai National Moose Range, had produced over 23,000,000 barrels of oil, and had paid to the United States royalties exceeding $8,000,000. The State of Alaska has received 90 per cent of these royalties—a vital part of its revenues.

III

Applicants have an intimate knowledge of the long and complicated factual history giving rise to the issues in this case. They believe they can materially aid this Court by presenting facts and reasons which demonstrate that the petitioner's construction of the orders relating to

the Kenai National Moose Range as leaving the Range open to oil and gas leasing is clearly correct, and which demonstrate that, prior to the time respondents filed their applications forleases in the Range, Congress and the President had adopted and ratified petitioner's construction of those orders. Each of these issues is conclusive against the claims of respondents and requires a reversal of the decision of the Court of Appeals.

For the reasons stated, applicants respectfully request leave to file the attached brief in support of the petitioner.

Dated: August 25, 1964.

Respectfully submitted,

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AMICI CURIAE BRIEF IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE

Late in 1954 and early in 1955, a number of individuals filed applications for oil and gas leases on lands lying within the Kenai National Moose Range on the Kenai Peninsula in Alaska (R. 38). On August 14, 1958, some of the respondents filed offers to lease the same lands. Acting pursuant to section 17 of the Mineral Leasing Act of 1920 (41 Stat. 437, 30 U.S.C. 181, et seq.), which requires leases on lands not within a known geologic structure to be issued to "the person first making application" therefor, the Interior Department issued leases, effective September 1, 1958, pursuant to the applications filed in 1954 and 1955 (R. 38). In October, 1959, when respondents' applications were reached for processing, they were rejected on the ground that leases had been issued to prior applicants (R. 38). The Court of Appeals, in the decision below, reversed this action and ordered leases issued to respondents.

Amici curiae Richfield Oil Corporation and Standard Oil Company of California hold operating agreements covering the above-mentioned leases issued effective September 1, 1958.

The validity of these leases, and of the rejection of respondents' later applications, can best be understood in the light of the history of the Kenai Moose Range and the various regulations and orders pertaining thereto.

CHRONOLOGY OF MAIN EVENTS

Under the Mineral Leasing Act of 1920 (41 Stat. 437, 30 U.S.C. 181, et seq.), the Secretary of the Interior was authorized to issue to the first qualified applicants therefor, oil and gas leases on public lands not within any known geologic structure of a producing oil and gas field. The Act excluded from its application certain designated lands, but did not exclude lands within wildlife refuge areas. The Secretary is not *required* by the Act to issue a lease to the first qualified applicant; the statute means merely that *if* the Secretary, in his discretion, decides to lease particular lands, he must lease them to the first qualified applicants; the first qualified applicant obtains only a priority or a preference right to a lease as against other applicants (see *United States ex rel McLennan v. Wilbur* (1931) 283 U.S. 414; *Haley v. Seaton* (1960) 281 F.2d 620, 625).[1]

Since the Secretary has discretion as to whether to issue a lease or not, whenever an application is filed he may, instead of rejecting it outright, accept it, accord it priority as against other applicants, and suspend action upon it for a reasonable period in order to decide how to exercise his discretion. As the Court said in *Dunn v. Ickes* (D.C. Cir. 1940) 115 F.2d 36, at 37, "It cannot be doubted that under many circumstances withholding action on such applications for a rather extended period would be eminently proper, if not essential to wise administration."

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[1]The regulations under which the Secretary will issue noncompetitive leases are set forth in 43 C.F.R. 3100, et seq. Prior to the April 1, 1964 revision of Title 43, the regulations were in Part 192 thereof.

A suspension does not relieve the Secretary of his statutory duty to issue a lease to "the person first making application for the lease" (49 Stat. 677, 30 U.S.C. 226(c)) in the event he should exercise his discretion in favor of leasing.

Creation of the Kenai Moose Range

On December 16, 1941, by Executive Order No. 8979, and acting "by virtue of the authority vested in me as President of the United States," the President withdrew and reserved some two million acres of land and water on the Kenai Peninsula in Alaska for use "as a refuge and breeding ground for moose" (6 F.R. 6471).[2] The order provided that:

> "None of the above-described lands excepting Tps. 5 N., Rs. 8, 9, 10 and 11 W., and also excepting a strip six miles in width along the shore of Cook Inlet, extending from a point six miles east of Boulder Point to the point on Kasilof River intersected by said six-mile strip, shall be subject to settlement, location, sale, or entry, or other disposition (except for fish trap sites) under any of the public-land laws applicable to Alaska, or to classification and lease under the provisions of the act of July 3, 1926, entitled 'An Act to provide for the leasing of public lands in Alaska for fur farming, and for other purposes', 44 Stat. 821, U.S.C., title 48, secs. 360-361, or the act of March 4, 1927, entitled 'An Act to provide for the protection, development, and utilization of the public lands in Alaska by establishing an ade-

[2]The withdrawal, not being a temporary one for public purposes, was not made under the Pickett Act of 1910 (36 Stat. 847, 43 U.S.C. 141-3; see 40 Ops.Atty-Gen. 73 (June 4, 1941)), but was made under the inherent power of the President.

quate system for grazing livestock thereon', 44 Stat. 1452, U.S.C., title 48, secs. 471-471o: *Provided, however,* That as to the foregoing excepted lands, primary jurisdiction shall remain in the General Land Office of the Department of the Interior and their reservation and use as a part of the national moose range shall be without interference with the use and disposition thereof pursuant to the public-land laws applicable to Alaska: *Provided further,* That the lands in the said excepted areas shall be classified by the General Land Office, Department of the Interior, and those lands classified as not suitable for settlement shall no longer be available for that purpose:"

A few months after the Range was created, the President delegated to the Secretary of the Interior the authority to sign all orders withdrawing or reserving public lands, or revoking or modifying such orders, and the Secretary has had this authority ever since that time.[2a]

From this time forward, therefore, the Secretary had delegated authority from the President to withdraw lands, or to revoke or modify a withdrawal, and in so doing, to close the lands to leasing, or to open them or leave them open to leasing; and, as to lands open to leasing he had discretionary authority to refuse to issue leases, and accordingly discretionary authority to reject applications for such leases, as well as discretionary authority to accept applications and accord them priority, but suspend action upon them until he had decided how to exercise his discretion.

[2a]See Executive Order 9146 of April 24, 1942 (7 F.R. 3067; Executive Order 9337 of April 24, 1943 (8 F.R. 5516); Executive Order 10355 of May 28, 1952 (17 F.R. 4831).

On June 16, 1948, exercising the authority delegated to him by the President, the Secretary signed Public Land Order 487 (13 F.R. 3462), withdrawing most of the lands excepted from the original Moose Range order

> "from settlement, location, sale or entry, for classification and examination, and in aid of proposed legislation."[3]

Initial Wildlife Refuge Regulation

On November 8, 1947, the Secretary of the Interior promulgated the first general regulation dealing with the issuance of oil and gas leases within wildlife refuges (43 C.F.R. 192.9; 12 F.R. 7334). The Kenai Moose Range was, of course, a wildlife refuge. The 1947 regulation provided in part that: "No noncompetitive oil and gas leases * * * will be issued for lands within a wildlife refuge (a) unless those lands are subjected to an approved cooperative or unit plan, and (b) unless the lease contains a provision which prohibits drilling or prospecting on the refuge lands except when consented to by the Secretary of the Interior upon the advice of the Fish & Wildlife Service."

This initial regulation clearly contemplated that noncompetitive oil and gas leases could and would be issued on wildlife refuge lands if the stated conditions were met.

Specific Withdrawals from Mineral Leasing

Neither E.O. 8979 nor P.L.O. 487 expressly withdrew any lands within the Kenai Moose Range from oil and gas leasing. In 1951, however, minor portions of the lands

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[3]This withdrawal was made under the Pickett Act of 1910 (36 Stat. 847, 43 U.S.C. 141-143).

within the Range were set aside for uses inconsistent with mineral leasing, and accordingly *were* withdrawn from leasing under the mineral leasing laws in Public Land Orders issued by the Secretary which provided that

> "the following described public lands in Alaska are hereby withdrawn from all forms of appropriation under the public-land laws, *including the mining laws and the mineral-leasing laws*" (italics added).[4]

It was perfectly clear up to this point, therefore, and clear on the official record from the actions of the Secretary that the bulk of the lands within the Moose Range was open to oil and gas leasing.

Oil and Gas Leasing in the Moose Range Up to 1955

On May 21, 1953, the first application for an oil and gas lease covering lands lying within the Moose Range was filed in the Anchorage Land Office in Alaska.[5] The application was accepted, and placed in order for processing.

By an intra-agency memorandum dated August 31, 1953, the Director of the Bureau of Land Management advised the Regional Administrators of the Bureau and the Managers of the local Land Offices that "a possible revision of policy and regulations" on leasing in wildlife refuges throughout the country was being studied (See

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[4]See Public Land Order 751 of August 29, 1951 (16 F.R. 9044), which withdrew 160 acres for the Civil Aeronautics Administration, and 88.86 acres for town-site purposes, and Public Land Order 778 of December 29, 1951 (17 F.R. 159), which withdrew a number of tracts within the Range, aggregating 4280 acres, for the use of the Army.

[5]See infra, p. 35.

Appendix, Brief of Amici Marathon Oil Company and Union Oil Company of California). Exercising on behalf of the Secretary the discretionary authority referred to above, supra, p. 2, he directed the local offices that "Pending the completion of this study and the possible revision of existing regulations, you will suspend action on all pending oil and gas lease offers and applications for lands within such refuges." In a subsequent memorandum[6] the Director said that this suspension was "so that the applicants may retain their priority of filing until a definite policy is established."[7]

No instructions were given in the memorandum of August, 1953, not to receive new applications for leases within wildlife refuges, and a Bureau of Land Management memorandum to the Area Administrator, Area 4 (Alaska), dated August 12, 1955 (infra, footnote 9), referring particularly to the Kenai Moose Range, explicitly stated that the 1953 order "does not prevent the filing of new offers for oil and gas leases in wildlife area", and that "applicants for oil and gas leases will preserve their priority."[8]

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[6]Memorandum from Director of Bureau of Land Management to Assistant Secretary of Interior Lewis dated Feb. 15, 1954.

[7]In an extension of remarks in the House of Representatives dated July 27, 1956, Representative Clare E. Hoffman of Michigan said (1956 Cong.Rec., Appendix, p. A. 6581, at A. 6582), "The pending applications were suspended, rather than canceled, to avoid inflicting an undeserved penalty on the applicants by depriving them of their filing priority, because of the shortcomings of the Government's regulations." By "shortcomings" Mr. Hoffman meant the alleged inadequacy of the 1947 regulations to protect wildlife areas.

[8]Thus, the instructions here involved are entirely different from those considered in *United States v. Wilbur* (1931) 283 U.S. 414, where the local offices were expressly instructed to reject

The "suspension order" of August 31, 1953, was given by an internal memorandum, never published in the Federal Register, and amounted simply to instructions by the Director to local subordinates on the course to be followed by them pending further advice from headquarters. It did not prevent the issuance of leases within the discretion of the Director,[9] and a lease on the application of May 21, 1953, referred to above, and leases on applications in a number of different refuges (including the Moose Range) were in fact issued during the so-called "suspension" period.[10]

During the latter part of 1954 and the early months of 1955, interest in the oil and gas prospects of the Kenai Peninsula increased, and a number of individuals—mainly residents of Anchorage, Alaska—filed applications for leases in the northern half of the Moose Range. Among these were applications covering all of the lands upon which Respondents filed lease offers almost four years

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pending applications and not to accept new applications for filing in order that the publicly announced policy of conserving oil in the ground could be carried out.

[9]In a memorandum from the Director of the Bureau of Land Management to the Area Administrator, Area 4 (Alaska), dated August 12, 1955, the Director stated,

> "Your attention is also called to the fact that there are existing regulations for issuing leases in wildlife refuges embodied in 43 C.F.R. 192.9. * * * Where applicants for oil and gas leases comply with 192.9 and our attention is called to it, we remove the suspension order as to such case and direct the issuance of leases in the absence of other objections."

[10]Hearing before the Sub-committee on Merchant Marine & Fisheries of the Senate Committee for Interstate and Foreign Commerce on S. 2101, 84th Cong., 2d Sess., pp. 92-93; Hearings before the House Committee on Merchant Marine & Fisheries on H.R. 5306, etc., 84th Cong., 2d Sess., pp. 142-146; 102 Cong. Rec. A. 6581-A. 6583.

later, the rejection of which led to this lawsuit. Again, the applications filed during this period were accepted and action on most of them was suspended in accordance with the 1953 instructions, each application receiving priority according to the date of its filing. None was rejected on the ground that the Moose Range was closed to leasing.

1955-1956

A few of the applications for oil and gas leases in the Moose Range filed during 1954 and 1955 were granted promptly after filing.[11] The bulk of them, because of the suspension order of August, 1953, and subsequent instructions from the Bureau of Land Management, were simply suspended pending possible revision of the existing wildlife refuge leasing regulations, and given priority as of the date of filing.

On September 9, 1955, the Secretary issued a new land order, P.L.O. 1212 (20 F.R. 6795), revoking in its entirety P.L.O. 487, which had been partially revoked by previous land orders. As to the bulk of the lands covered thereby, P.L.O. 1212 provided that after a time the land should become subject to appropriation by veterans and others entitled to a preference, for a preliminary period, and after that "shall become subject to * * * appropriation by the public generally as may be authorized by the public-land laws, including the mineral leasing laws." A few

[11] In Interior Department Press Release No. 93809, issued early in 1956, the Department said that during the suspension directed by the memorandum of August 31, 1953, "no leasing [in wildlife refuges] was permitted except in cases where it was necessary for the Government to protect itself from oil drainage or where possible damage to wildlife values was not involved."

weeks later, P.L.O. 1212 was amended by deleting the reference to the mineral leasing laws (20 F.R. 7904).[12]

On December 8, 1955, the anticipated revision of the refuge-leasing regulation was promulgated (20 F.R. 9009). The new regulation was much more restrictive than the old one, and gave increased power to the Fish & Wildlife Service to approve or disapprove oil and gas development of refuges. It listed in an Appendix A a number of refuges (not including Kenai) in which no leasing at all would be permitted because of their importance to the preservation of rare species of plant and animal life. It then listed in Appendix B certain areas (including a small part of the Moose Range not involved here) in which the Fish & Wildlife Service had determined that leasing, unless closely regulated, would jeopardize conservation purposes. In such areas leasing was to be permitted only upon the approval by the Director of the Fish & Wildlife Service "of a complete and detailed operating program for the area." In all other wildlife areas the regulation provided that "oil and gas leases may be issued" provided they contain specified conditions requiring approval

[12]The reference to the mineral leasing laws in the original text was certainly never intended to open the lands up to leasing for the first time since the promulgation of P.L.O. 487 in 1948, as is shown by the Secretary's repeated acceptance of applications for leases on the lands covered by P.L.O. 487 during its existence, including those applications which led to the leases held by amici Marathon and Union on the lands applied for by the respondent Coyle (see infra, pp. 35, 36). Of the lands involved in this litigation only those covered by the Coyle application lie within the area affected by P.L.O. 1212.

by the Fish & Wildlife Service of the type of prospecting conducted, and adoption by the lessees of a unit plan approved by the Service.

By expressly including a part of the Moose Range in Appendix B, the 1955 regulation necessarily included the rest of the Moose Range in the residual areas within which oil and gas leases could be issued. It thereby confirmed the pre-existing availability of the entire Moose Range for leasing under E.O. 8979 and P.L.O. 487.

The 1955 regulation had the effect of terminating the August 1953 "suspension" of leasing by local land offices. However, at the request of the Fish & Wildlife Service the suspension was almost immediately reinstated as to all refuges not listed in Appendices A and B of the new regulation. Upon the introduction in Congress of bills further to restrict leasing in wildlife refuges,[13] the Interior Department's study of refuge leasing policy was resumed, and the Bureau of Land Management field offices were again directed to suspend action on lease applications in all refuges. Short-term suspensions were first directed, which were later made indefinite.[14] A March 30, 1956 order from the Bureau of Land Management directed that the suspension should be continued until further notice, explaining that "this does not suspend all preliminary action which should continue to be taken. The suspension applies only to final action in such matters."

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[13]See hearings referred to in footnote 10, supra.

[14]Cong. Rec., January 9, 1956, p. 220; 68 I.D. 298.

Once again, of course, the "suspensions" consisted simply of operating instructions from the Bureau of Land Management to subordinate offices, and with appropriate internal and sometimes Congressional approval[15] a significant number of leases on refuge lands continued to be issued where this could be done without prejudice to wildlife values. Thus, in 1956 and 1957 thirty-one leases were issued on lands within the Moose Range withdrawn by E.O. 8979, twenty-six to amicus Richfield Oil Corporation and five to various individuals, which were subsequently place in the Swanson River Unit.

1957

In July, 1957, oil was discovered in the Moose Range by amicus curiae Richfield Oil Corporation on one of the Swanson River Unit leases issued in 1956. In his annual report to the President for the fiscal year ended June 30, 1957, the Secretary of the Interior said,

> "Shortly after the close of the fiscal year the Richfield Corp. brought in a well on the Kenai Peninsula. The resulting boom in oil leases saw nearly three-quarters of a million acres filed on in a single day. There is no doubt that a confirmed oil strike in Alaska will mean a tremendous stimulus to the Territory's economic growth."

1958

The final result of the discussion and study of the leasing policies to be followed in wildlife refuges was the adoption on January 8, 1958, of a second complete revision of the regulations (23 F.R. 227). The new regulation

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[15]H.R. No. 1941, 84th Cong., 2d Sess., pp. 12-13; infra p. 41.

prohibited oil and gas leasing in many wildlife areas altogether,[16] conferring on the Fish & Wildlife Service sole and complete jurisdiction over these areas. As to "game range lands" and "Alaska wildlife areas," the Bureau of Land Management and the Fish & Wildlife Service were to reach agreements specifying the lands which "shall *not* be subject to oil and gas leasing" (emphasis supplied) and the provisions required to be included in leases issued on the remaining lands. The agreements were to become effective upon approval by the Secretary and publication in the Federal Register. The regulation further provided that "all pending offers or applications heretofore filed for oil and gas leases covering game ranges, coordination lands, and Alaska wildlife areas, will continue to be suspended until the agreements referred to • • • shall have been completed," and that no new lease applications would "be accepted for filing until the tenth day after the agreements • • • are noted on the land office records."[17]

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[16]Unless leasing was necessary to prevent drainage (43 C.F.R. 3120.3-3(b)(2), formerly sec. 192.9(b)(2)).

[17]The period from January 8, 1958, until the tenth day after notation on the Land Office records of the agreement between the Bureau of Land Management and the Fish & Wildlife Service relating to the Moose Range (which was August 4, 1958, see infra p. 16), was therefore the only period from 1941 to the present time when all of the Range was closed to oil and gas lease applications.

Despite the clear admonition in the January, 1958 regulation that no new lease applications would be accepted during this period, all of the respondents, except Alice P. Tallman and Waldo E. Coyle, filed applications for oil and gas leases in the Moose Range on the lands involved in this suit during April and May 1958 (see Appendix p. i). These applications were, of course, rejected and the rentals proffered by applicants returned to them. On August 14, 1958, respondents refiled these offers, and it was the rejection of these offers as not being the first qualified applications which led to this lawsuit.

Meanwhile, the discovery of oil on the Moose Range had brought into sharp focus a serious title defect in the oil and gas leases issued on the public domain in Alaska. This defect arose from the fact that while the Secretary was authorized to issue leases on the public domain, he had ruled that he did not have the authority to issue leases on lands beneath inland navigable waters, which were held in trust for the future State of Alaska. The Department of the Interior sponsored a bill to remedy this defect, which was enacted into law on July 3, 1958, as the Alaska Submerged Lands Act (72 Stat. 322; 48 U.S.C. 456 and 30 U.S.C. 251). With specific intent to give recognition to the equities of those who had spent large sums to find Alaska's only commercial production of oil—which was, of course, in the Moose Range—Congress granted a preference right to holders of existing leases or applications for leases to have the inland navigable waters within the boundaries of those leases or applications included therein. Both the existing leases and the long pending applications within the Moose Range were specifically brought to the attention of Congress during the consideration of this act.[18]

On August 2, 1958, and pursuant to the revised regulation adopted on January 8, 1958, the Secretary published in the Federal Register a notice announcing that agreement had been reached between the Bureau of Land Management and the Fish & Wildlife Service with respect to the Kenai Moose Range (23 F.R. 5883). The notice specified that certain lands within the Range (essentially, the

[18]Hearings before Senate Committee on Interior and Insular Affairs, 85th Cong., 2d Sess., on H.R. 8054, pp. 77, 101.

southern half) "are hereby closed to oil and gas leasing because such activities would be incompatible with management thereof for wildlife purposes." and that "the balance of the lands within the Kenai Moose Range are subject to the filing of oil and gas lease offers."[19] The notice went on to provide that

> "* * * lease offers for lands which have not been excluded from leasing will not be accepted for filing until the tenth day after the agreement and map are noted on the records of the land office * * *"

and that all lease offers filed within ten days after that would be treated as having been filed simultaneously.

As to existing offers, the notice also provided that

> "offers to lease covering any of these lands which have been pending and upon which action was suspended * * * will now be acted upon and adjudicated in accordance with the regulations * * *"[20]

In a press release issued shortly before publication of the notice of the agreement, and before the respondents filed the offers on which they now rely, the Secretary made clear that most of the lands open to leasing were already covered by existing offers, and that in fact the area available for new applications would be small. In a Department of Interior Press Release dated July 25, 1958,

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[19]The closing of a part of the Range was an exercise of the Secretary's discretion not to issue leases, rather than an exercise of his delegated power to withdraw lands (Richard K. Todd (1961) 68 I.D. 291).

[20]Under the regulations, priority as among the simultaneously filed offers was to be determined by a drawing (43 C.F.R. 295.8). However, as the notice made clear, all simultaneously filed offers were subject to existing offers, if valid.

it was stated that "Most of these lands are now covered by applications that will be adjudicated under regulations of the Department."

The agreement between the Bureau of Land Management and the Fish & Wildlife Service covering the Moose Range was noted in the Anchorage Land Office on August 4, 1958. The respondents filed their applications on the tenth day after that, to-wit, August 14, 1958. When they did so, they had at least constructive knowledge that the lands they applied for were covered by prior applications,[21] and actual knowledge that these previous offers would have priority.[22]

Shortly after the agreement was noted in the land office records, the processing of the pending but suspended applications was resumed, as provided by the Secretary's order. Since, as has been noted (supra, p. 11), only final action on these applications had been suspended, this processing moved quickly.

Effective September 1, 1958, the land office granted leases on the lands in suit to the first qualified applicants therefor—who, of course, were not respondents—on the basis of their offers which had been pending since January, 1955.

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[21]James C. Forsling (1938) 56 I.D. 281, 285-286.

[22]See letter of June 13, 1958, from Asst. Secretary of the Interior Ernst, advising Respondent Bailey E. Bell that "While the order of 1953 suspended issuance of leases for lands within wildlife areas, it did not prohibit the filing of offers for such lands. Consequently, all offers filed for lands in the Kenai Moose Range prior to the approval of the regulations of January 8, 1958, have a priority of filing as of the date received in the Anchorage Land Office" (Appendix, p. ii).

Leases covering the lands herein in dispute were issued to a number of different individuals, who later entered into agreements for the operation thereof with amici Richfield Oil Corporation, Standard Oil Company of California, Marathon Oil Company and Union Oil Company of California, or assigned them outright to one or more of these companies. Many other leases were issued to local residents of Alaska who had applied for them in the fall of 1954 and early 1955.

When in due course the applications filed on August 14, 1958, were reached for adjudication, those in conflict with prior offers and with leases already issued pursuant to such offers, including the applications filed by respondents, were rejected for lack of priority.

Legal Proceedings

Following rejection of their applications by the Anchorage Land Office, respondents appealed, and the rejection was affirmed by the Director and the Acting Director of the Bureau of Land Management and by the Secretary of the Interior. The decision of the Secretary is reported in 68 I.D. 256.

Following the Secretary's affirmance of the rejection of their applications, respondents brought suit in the Federal District Court for the District of Columbia to compel the Secretary to issue oil and gas leases to them. None of the applicants for leases on the lands in question who were prior in time to respondents, and none of those interested in the leases granted pursuant to such prior applications, including amici Standard Oil Company of

California and Richfield Oil Corporation, was named as a party to this action or given any notice of its filing.

The district court granted summary judgment in favor of the Secretary, dismissing respondents' complaint. The Court of Appeals for the District of Columbia reversed, and ordered leases issued to respondents.[23] Amici learned of the existence of this case for the first time when the Court of Appeals' decision was handed down, and lent their support to petitioner's application to that Court for a rehearing, which was denied. This court granted certiorari.

SUMMARY OF ARGUMENT

An examination and analysis of Executive Order 8979, within its four corners, shows that it did not close any part of the Moose Range to oil and gas leasing. The order was intended only to prevent alienation of the title of the United States.

Since E.O. 8979 did not close any part of the Range to leasing, clearly Public Land Order 487 did not.

The Interior Department has repeatedly and consistently construed the orders creating and governing the Moose Range, and others like them, as leaving the lands

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[23]The Court of Appeals was misled as to the facts. In both their Opening Brief (p. 30) and their Reply Brief (p. 3), respondents told the Court of Appeals that no leases were issued covering lands within the Moose Range between 1941 and 1958. In their Opening Brief (p. 40), respondents also told the Court of Appeals that "The discovery as well as the increased activity were in areas of the Kenai Peninsula outside of the Kenai National Moose Range * * *." Amici, not being parties to the litigation, were unable to correct these misstatements of fact.

involved open for leasing, within the discretion of the Secretary. This long-standing construction facilitates the Government's policy of encouraging the multiple use of public lands. It has been made a matter of public record many times, and many hundreds of leases within the Moose Range have been issued upon the basis of it, and a great many millions of dollars spent exploring and developing these leases. It should not be disturbed now unless it is plainly wrong, which it is not.

Both Congress and the President have ratified and confirmed this construction.

Amici are indispensable parties to this action, since they hold existing Federal leases on the lands on which respondents now seek leases from the Secretary.

I

NEITHER E.O. 8979 NOR P.L.O. 487 CLOSED THE LANDS WITHIN THE MOOSE RANGE TO OIL AND GAS LEASING.

As noted above, E.O. 8979 of December 16, 1941 (6 F.R. 6471) withdrew some two million acres of land and water on the Kenai Peninsula "for the use of the Department of the Interior and the Alaska Game Commission as a refuge and breeding ground for moose," and provided that none of the lands withdrawn

> "• • • shall be subject to settlement, location, sale, or entry, or other disposition (except for fish trap sites) under any of the public-land laws applicable to Alaska, or to classification and lease under the provisions of the act of July 3, 1926, entitled 'An Act to provide for the leasing of public lands in

> Alaska for fur farming, and for other purposes', 44 Stat. 821, U.S.C., title 48, secs. 360-361, or the act of March 4, 1927, entitled 'An Act to provide for the protection, development, and utilization of the public lands in Alaska by establishing an adequate system for grazing livestock thereon', 44 Stat. 1452, U.S.C., title 48, secs. 471-471o."

The Court of Appeals held that this order closed the unexcepted lands within the Moose Range to oil and gas leasing from 1941 to 1958, and that the leases issued on applications filed during that period, including those held by amici, are "nullities".

P.L.O. 487 of June 16, 1948 (13 F.R. 3462) withdrew most of the lands excepted from the original Moose Range order

> "from settlement, location, sale or entry, for classification and examination, and in aid of proposed legislation."

The Court of Appeals also held that this order closed the lands covered thereby to oil and gas leasing.

The Court erred in both instances.

A. Under the rule of ejusdem generis, the word "disposition" in E.O. 8979 means only a disposition leading to alienation of title of the United States.

E.O. 8979 withdrew the lands covered thereby "from settlement, location, sale or entry, or other disposition (except for fish trap sites) under any of the public-land laws applicable to Alaska, or to classification and lease under" the fur farming and livestock grazing acts of 1926 and 1927. The words "settlement, location, sale or entry"

are all technical words having definite meanings in the parlance of the public-land laws. Each contemplates or encompasses a final acquisition from the Government of title to the lands referred to. Neither a permit to prospect for oil nor a lease to extract oil on lands owned by the United States obtained under the Mineral Leasing Act would or will secure to the permittee or lessee the right finally to acquire title to the land covered by the permit or lease issued by the Government.

Under the doctrine of *ejusdem generis*, therefore, the general expression "or other disposition" following immediately after the specific words "settlement, location, sale or entry" must be construed to mean only dispositions conveying or leading to the conveyance of the title of the United States, such as, for example, a "grant", "selection" or "allotment" of public lands, each of which is a form of alienation of title not covered by the specific words enumerated.[23a] (See Public Law No. 679 of 1929 (45 Stat. 1091) and Public Law No. 171 of 1906 (34 Stat. 197) infra p. 22). It does not, therefore, include leasing under the Mineral Leasing Act.[23b]

B. The reference in E.O. 8979 to the leasing acts of 1926 and 1927 shows that the preceding language was intended to refer only to dispositions leading to alienation of the title of the United States.

The reference to the acts of 1926 and 1927 in E.O. 8979 clearly shows that the word "disposition" does not include leasing, but was meant to refer only to public land

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[23a] See 2 Sutherland on Statutory Construction (3d Ed.) p. 395.

[23b] See opinion of Solicitor General of the Interior Department dated September 30, 1921 (48 I.D. 459, infra p. 30).

laws providing for alienation of the title of the United States. The 1926 and 1927 acts were referred to because they provided for leasing rather than the "disposition" of lands.

The Court of Appeals' contrary conclusion is clearly erroneous. It sought to explain the reference to the 1926 and 1927 acts by construing the phrase "any of the public land laws applicable in Alaska" to mean laws of general applicability throughout the country which are applicable in Alaska, and held that the 1926 and 1927 acts were specifically referred to because they did not come within this category.

If the Court of Appeals were correct in this conclusion, then E.O. 8979 did not withdraw the lands in the Moose Range from the operation of any of the public land laws applicable to Alaska alone *except* the fur farming and livestock grazing acts of 1926 and 1927 specifically referred to. For example, a statute of March 3, 1891 (26 Stat. 1099; 48 U.S.C. 355) provided that "lands in Alaska may be entered for townsite purposes, for the several use and benefit of the occupants of such town sites * * *"; Public Law 171 of 1906 (34 Stat. 197; 48 U.S.C. 357) was "An Act authorizing the Secretary of the Interior to allot homesteads to the natives of Alaska"; Public Law 679 of 1929 (45 Stat. 1091; 48 U.S.C. 354a) was "An Act making an additional grant of lands for the support and maintenance of the Agricultural School and School of Mines of the Territory of Alaska, and for other purposes," and authorized the Territory to select 100,000 acres of public lands for the benefit of the schools named;

and Public Law 863 of 1940 (54 Stat. 1192; 48 U.S.C. 363) was an act "To authorize the Secretary of the Interior to sell or lease for park or recreational purposes, and to sell for cemetery purposes, certain public lands in Alaska." Doubtless other public-land laws applicable specifically to Alaska could be found.

It is quite clear that the President, in creating the Kenai Moose Range, intended to withdraw the lands involved from allotment, grant or sale under these and similar acts, and that the Court of Appeals' contrary construction of E.O. 8979 is directly contrary to this obvious intention.

E.O. 8979 also provided that the reservation and use of the excepted lands as part of the Moose Range should be without interference with the use and disposition thereof pursuant to "the public land laws applicable to Alaska". If the Court of Appeals' construction of this phrase were correct, the order meant that this excepted area was open to use and disposition under public land laws applicable throughout the country and also applicable in Alaska, but not under public land laws applicable only to Alaska—a patent absurdity.

In addition, in reaching its construction of the order, the Court of Appeals violated several basic and accepted rules of construction. The first rule of construction is, of course, that the words of a statute or other document are to be taken according to their natural meaning (*Mason v. United States* (1923) 260 U.S. 545, at 554, 67 L.Ed 396, at 399). The natural meaning of "*any* public-land law appicable to Alaska" is any such law so applicable, whether

one generally applicable throughout the country and also applicable to Alaska, or one applicable to Alaska alone.

The Court of Appeals not only ignored the word "any" in the reference to publi d laws, but read into the order the bracketed and italicized words: "under any of the public-land laws [*of general application which are also*] applicable to Alaska." In 57 Am.Jur., section 1153, pages 750-751, it is said that while in construing wills, words, phrases and clauses may sometimes be supplied, "this procedure is to be sparingly employed and is never to be resorted to upon mere conjecture or hypothesis as to the testator's intention." That rule is applicable here, since the addition of the words supplied by the Court of Appeals cannot be said to rest on anything more than mere conjecture.

Further, if, as the Court of Appeals said, "disposition" was meant to include leasing, the words "to classification and lease" in the reference to the acts of 1926 and 1927 are rendered tautological and superfluous, and should have been omitted, or replaced by the words "to disposition." Thus E.O. 8979 provided that

> "None of the above described lands * * * shall be subject to settlement, location, sale, or entry, or other disposition (except for fish-trap sites) under any of the public-land laws applicable to Alaska, or *to classification and lease* under * * * the act of July 3, 1926 * * * or the act of March 4, 1927 * * *" (italics added).

If the Court of Appeals were correct, the italicized words could have been omitted. Since they were not, they must be given some effect, under the settled rule that some effect must be given to all words, clauses and provisions

in a statute or other instrument.[23c] If the words "to classification and lease" are given effect, the previous word "disposition" must *not* include leasing.

Another rule of construction is that where varying expressions are used, different meanings are intended (see 50 Am.Jur., sec. 274, p. 261). If the Court of Appeals was correct in its construction of the order, the order could have simply repeated the word "disposition" instead of saying "classification and lease" under the 1926 and 1927 acts. Since it did not, something different must have been intended by the different expressions—ergo, "disposition" does *not* include leasing.

The Court of Appeals' construction of E.O. 8979 is therefore plainly wrong.

C. The Court of Appeals construction was based upon the presence of the fish trap exception, which had no place in the order.

The Court of Appeals gave no reason for adopting its explanation for the reference to the 1926 and 1927 leasing acts, in violation of all of the aids to construction referred to above, except to say that the specific exemption of fish trap sites in the order strengthened its conviction that its explanation was correct. Continuing, the court said:

[23c] In 2 Sutherland on Statutory Construction (3d Ed.) at page 339, it is stated:

"'It is an elementary rule of construction that effect must be given, if possible, to every word, clause and sentence of a statute.' A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous * * *."

See also *Mason v. United States* (1923) 260 U.S. 545, at 554.

> "If the order were designed to cover only the total alienation of the interest of the United States, then specification of fish trap sites would be unnecessary, for permission to fish by traps is acquired not by deed but by a license, similar in many respects to a lease. Furthermore, the specific inclusion of one exception in the order indicates that other exceptions should not be implied (as the Secretary urges) but that the prohibition on disposition should be read in an expansive manner."

Permission to fish by traps was not, however, and could not be "acquired • • • by a license, similar in many respects to a lease," as the Court of Appeals said. Section 1 of the Alaska Fisheries Act of 1924 (43 Stat. 464), the so-called "White Act," specifically provided that "no exclusive or several right of fishery shall be granted" in Alaska; and an Opinion of the Solicitor of the Interior Department dated March 20, 1942 (58 I.D. 1), concurred in by the Attorney General of the United States on April 8, 1942 (40 Ops.Atty.Gen. 175), makes clear that one acquired a fish-trap site in Alaska simply by being the first to occupy it under a common right of fishery, and not by virtue of any license or lease of the site.

In *Hynes v. Grimes Packing Co.* (1949) 337 U.S. 86, at 121, 93 L.Ed. 1231, at 1256, cited by respondents to the Court of Appeals, this Court said that "licenses for fishing *may* be required in areas regulated under the White Act" (italics added). The Court followed this immediately, however, by saying "We think, however, these licenses may be only regulatory in character • • •." Obviously, therefore, if such licenses had been issued they could not have been similar to leases.

In *Kake Village v. Egan* (1962) 369 U.S. 60, at 62, this Court confirmed this, saying with regard to fish-trap sites in Alaska,

> "Moreover, the White Act gives the Secretary power only to limit fishing, not to grant rights."

The opinion of the Solicitor of the Interior Department, dated March 20, 1942 (58 I.D. 1), shows that at that time the Territory of Alaska issued licenses to take fish from Alaskan waters, and that the War Department issued permits certifying that the erection of fish traps at given points would not interfere with navigation, but these licenses and permits gave no right to occupy a particular site. The opinion in *Kake Village v. Egan,* supra, shows that at that time permits were also obtained from the Forest Service to anchor fish traps on the uplands, but this Court said of these permits, as well as of the permits obtained from the War Department (369 U.S. 63):

> "Like a certification by the Interstate Commerce Commission, each is simply acknowledgment that the activity does not violate federal law."

The Court of Appeals was wrong, therefore, in saying that licenses similar to leases were issued for fish-trap sites. No license was issued giving any right to occupy a particular fish-trap site, whether similar to a lease or otherwise.

It is clear, therefore, since there was no disposition by the United States of any interest of any kind in public lands for fish-trap sites, that the exception for such sites in E.O. 8979 does not refer back to the previous word "disposition" in that order.

On the contrary, the exception was inserted merely for the general purpose of making clear to Alaskans that fish-trap sites in the Moose Range were not forbidden by the order. Fishing was the principal industry in the Territory,[24] and according to the Commissioner of Indian Affairs, the "life [of the Indians in Alaska] was based largely on the salmon catch."[25] It was highly important, therefore, that the Alaskans not get the mistaken idea that they could no longer establish fish-trap sites in the Kenai Moose Range.

The exception is obviously out-of-place, and from a technical legal point of view has no relation to the provision in which it is contained, and should not be there at all. In the light of this illogicality, surely property rights worth hundreds of millions of dollars, and the vital interests of the newest state in the Union, are not to turn on the mere inclusion of an exception having basically nothing to do with the provision in which it was included.

D. P.L.O. 487 did not close any lands within the Range to leasing.

As noted above, E.O. 8979 excepted certain lands within the Moose Range from its operation. P.L.O. 487 withdrew most of these excepted lands from "settlement, location, sale or entry." This order contained no reference to "other disposition," to "public-land laws applicable to Alaska," to "fish-trap sites," or to the fur-farming or livestock-grazing leasing acts of 1926 and 1927. Despite this, and without giving any explanation for its holding,

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[24]Report No. 2379, House of Reps., 76th Cong., "Investigation of the Fisheries of Alaska."

[25]57 I.D. 461, at 462.

the Court of Appeals also held that P.L.O. 487 closed the lands covered thereby to mineral leasing until it was revoked in its entirety on September 9, 1955.

If the Court of Appeals' construction of E.O. 8979 was wrong—as it was—then obviously its construction of P.L.O. 487 was also wrong.

Since we have demonstrated the former, we shall not discuss the latter further.[27]

II

THE SECRETARY'S CONSTRUCTION OF E.O. 8979 AND P.L.O. 487 AS LEAVING THE MOOSE RANGE OPEN TO LEASING HAS BEEN UNIFORM AND CONSISTENT OVER A LONG PERIOD OF TIME, AND SHOULD NOT BE DISTURBED.

A. The Government's construction of E. O. 8979 and P.L.O. 487 as leaving the Moose Range open to oil and gas leasing is confirmed by the well-established practice of the United States in making and construing withdrawals both before and after 1941.

In the early days one acquired the right to extract oil and gas from public lands by making a location under the placer mining law (17 Stat. 91; 29 Stat. 526). Upon proof of a valuable discovery, the locator could obtain a patent from the United States conveying full title to the land.

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[27] Of the ten lease applications by Respondents rejected by the Secretary, only the W. E. Coyle application was for lands covered by P.L.O. 487. The other nine applications were for lands within the Range not covered by P.L.O. 487. The lands covered by the Coyle application were leased by the Secretary on the basis of prior applications filed while P.L.O. 487 was in effect.

On July 17, 1914, Congress enacted a bill providing for agricultural entry of lands withdrawn, classified or reported as containing minerals (38 Stat. 509), and on December 29, 1916, it enacted a bill permitting stock-raising entries, with all the minerals being reserved to the United States (39 Stat. 862). These "separation acts" were the first declaration by Congress of a policy of multiple use of public lands.

The Mineral Leasing Act of February 25, 1920 (Stat. 437, 30 U.S.C. 181, et seq.) was an extension of this policy. It did away with the practice of disposing of the Government's title to mineral lands for nominal sums under the mining laws, and inaugurated a new policy under which the Government retained title to the lands. Specific minerals enumerated in the Act, including oil and gas, were made subject to prospecting permits and leases (see *Ickes v. Development Corp.* (1935) 295 U.S. 639, 645).

Soon after the Mineral Leasing Act was adopted, a question arose as to the effect of the later Federal Water Power Act of June 10, 1920 (41 Stat. 1063), which provided that lands included in any project under the Act were "reserved from entry, location or other disposal under the laws of the United States • • •." In an opinion dated September 30, 1921 (48 I.D. 459), the Solicitor of the Interior Department concluded that such lands were still open to leasing under the Mineral Leasing Act. Saying that "entry" and "location" are technical words describing initial steps looking to the final acquisition of title from the Government, he applied the rule of "ejusdem generis" to reach the conclusions that "other disposal" also meant only actions leading to an alienation of title.

Since that time, it has been a consistent practice of the Interior Department in drafting and making withdrawal orders and reservations expressly to negative leasing under the Mineral Leasing Act where that was intended. This practice was in accord with the Government's policy of promoting the multiple use of public lands where appropriate. This policy was expressed as follows, as to wildlife refuges, in the Secretary's report to the President for the fiscal year ended June 30, 1952 (p. 329):

> "Refuges are managed on a multiple-use basis, so far as this can be accomplished without defeating the primary objective for which each was established."

In the Appendix to their Brief in Support of Petition for Certiorari, amici listed in three tables, and for the period from 1920 through 1952, the orders withdrawing public lands containing language substantially the same as that contained in E.O. 8979, those containing language essentially the same as that contained in P.L.O. 487, and those containing language expressly barring mineral leasing. (These tables are also set forth in the Appendix to the brief of amici Marathon Oil Company and Union Oil Company of California on the merits). These tables show that during the years 1920-1952, some 264 withdrawal orders used language substantially the same as that employed in E.O. 8979, and at least 413 contained language identical to that in P.L.O. 487. Under the rationale of the Court of Appeals' holding in this case, all oil and gas and other leases issued on the lands covered by these 677 withdrawal orders would be "nullities."

On the other hand—if the Court of Appeals' ruling is correct—the Interior Department some 173 times during

these years used entirely different language to accomplish the same result—i.e., sometimes expressly withdrew lands from mineral leasing, and sometimes withdrew lands from leasing by general language similar to that employed in E.O. 8979 and P.L.O. 487.

The orders listed in Tables I, II and III show conclusively that when the Government intended to withdraw lands from mineral leasing, it said so expressly.

Over the years involved, the Interior Department repeatedly ruled, as it had in its Opinion of September 30, 1921, supra, p. 34, that withdrawn or reserved lands were open to mineral leasing unless it was expressly provided otherwise. These rulings facilitated the Government's policy of compatible, multiple use of Federal lands, for under them withdrawn lands were open to leasing, but the Secretary in his discretion could refuse to issue leases if he concluded that they would interfere with the purposes for which the lands were withdrawn. Thus in an Opinion dated February 8, 1935 (55 I.D. 205), the Solicitor of the Department held that oil and gas permits and leases could be issued on lands withdrawn by an executive order from "settlement, location, sale or entry," saying with respect to the Mineral Leasing Act (p. 211):

> "* * * that act is operative within reserved areas, with certain specified exceptions."

The exceptions referred to by the Solicitor clearly were those provided for in the statute itself, which, as has been noted, do not include wildlife areas.

In 1951, the leading treatise on the issuance of oil and gas leases on public lands described the Department's practice as follows:

> "Ordinarily a withdrawal from sale or other disposition of the public domain is no bar to the issuance of a lease, as leasing is not disposing of the land, it is merely granting the right to prospect and, upon discovery, to produce oil or gas from the land under prescribed conditions. Title to the lands and the minerals therein remain in the United States."

L. E. Hoffman, Oil and Gas Leasing on the Public Domain (1951), pages 33-34. Mr. Hoffman was then the Chief of the Branch of Minerals of the Bureau of Land Management.

In *Noel Teuscher et al.* (1955) 62 I.D. 210, the Solicitor of the Interior Department concluded that lands withdrawn "from settlement, location, sale or entry, and held for the exclusive use and benefit of the United States Navy Department for naval purposes" were still open to oil and gas leasing, and in so doing affirmed (p. 213):

> "the rule that in general withdrawn or reserved lands are subject to leasing under the Mineral Leasing Act."[28]

The Government has for 44 years, therefore, followed a policy of saying so expressly when it intended to withdraw lands from mineral leasing. In every case in which the question has been raised, the Interior Department has held that orders which did not expressly so provide did

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[28]The *Teuscher* case was recently followed in connection with another wildlife refuge (see *Paul Gordon, Amerada Petroleum Corporation* (1963) 70 I.D. 225). *Teuscher* was cited with approval in Senate Report 1549 of June 10, 1960, on H.R. 10455 (the Mineral Leasing Act Revision of 1960), 86th Cong., 2d Sess.

not withdraw the lands from oil and gas leasing.[20] The Court of Appeals has, with no reference to and, so far as its opinion shows, no consciousness of this policy, completely rewritten this long history, given hundreds of withdrawal orders a meaning never intended by their authors, and struck a major blow at the compatible, multiple uses policy of the Government.

B. The Government's construction of E.O. 8979 and P.L.O. 487 as leaving the Moose Range open to leasing is confirmed by the subsequent amendments to these orders specifically closing certain portions of the Range to leasing.

As has been noted above, E.O. 8979 withdrew lands within the Moose Range from "settlement, location, sale or entry, or other disposition (except for fish-trap sites) under any of the public-land laws applicable to Alaska, or to classification and lease under" the acts of 1926 and 1927.

P.L.O. 487 simply withdrew the lands excepted from the first order from "settlement, location, sale or entry."

In P.L.O.s 751 and 778, issued by the Secretary in 1951 (supra p. 6), lands covered by P.L.O. 487 were withdrawn for townsite purposes and for the use of the Civil Aeronautics Administration and the Army from

> "all forms of appropriation under the public-land laws, *including the mining laws and the mineral leasing laws*" (italics ours).

If, as the Court of Appeals held, P.L.O. 487 had withdrawn the lands from all forms of "disposition" under

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[20] In *D. Miller* (1948) 60 I.D. 161, the Solicitor reached a conclusion contrary to this, but in *Noel Teuscher et al.* (1955) 62 I.D. 210, *Miller* was overruled.

the general land-laws, including mineral leasing, these orders were unnecessary, and the express withdrawal from the mining and mineral leasing laws accomplished nothing.

C. The Interior Department has consistently treated the bulk of the lands within the Moose Range as open to oil and gas lease applications, from the creation of the Range down to the present day, except for the period during which it was closed by the regulation of January, 1958.

As has already been noted, the first application for an oil and gas lease covering lands within the Kenai Moose Range was filed on May 21, 1953. It was Anchorage No. 024159, filed in the Anchorage Land Office by one Amy Greenwood and covered 2560 acres, approximately 20 acres of which were located within the area withdrawn by E.O. 8979. The application was accepted, processed, and a lease pursuant thereto issued effective October 1, 1953.[30]

In 1954, four more leases were issued on lands lying partly within the area covered by E. O. 8979, one to Richard K. Todd and three to Charles D. Ealand. One of the leases to Ealand covered more than a full section of land within the Moose Range.

In 1955, three more leases were issued on lands lying partly within the area covered by E.O. 8979, two to L. E. Grammer and one to amicus Marathon Oil Co. (then Ohio Oil Co.). One of the leases to Grammer covered more than 3 sections of land lying within the area covered by E.O. 8979, and the lease to Marathon covered one full section lying within this area. Twenty-two more leases

[30]These data and the other data contained in this point, except where otherwise noted, appear in the records of the Anchorage Land Office.

were issued on lands covered in their entirety by P.L.O. 487, two to L. E. Grammer prior to the revocation of that order, and twenty to amicus Marathon after its revocation, but all on the basis of applications filed during the existence of the order.

In 1956 two more leases were issued on lands lying partly within the area covered by E.O. 8979, one to Walter L. Hamshaw and one to F. E. Sullivan; and one more lease was issued, to Paul Combs and G. J. Welch, on lands which had been covered by P.L.O. 487, based on an application filed during the existence of that order.

During the latter part of 1956 and early part of 1957, 31 additional leases were issued in what became the Swanson River Unit of the Kenai Moose Range. These leases covered 71,680 acres "withdrawn" by E.O. 8979, and were issued with the approval of the House of Representatives Committee on Merchant Marine & Fisheries. It was on these leases that amicus Richfield Oil Corporation discovered oil the following year.

In each case, of course, the Government treated the Moose Range lands in question as open to leasing, and issuance of the leases referred to was noted on the Land Office records.

While the number of leases within the Moose Range actually issued was rather small because of the "suspension order" referred to above, numerous applications for leases within the Range were filed and accepted.

In his Annual Report for the fiscal year ended June 30, 1955, the Governor of Alaska said (pp. 60-61): "The Kenai Moose Reserve is covered with 325 lease applications

awaiting decision of the Secretary of the Interior as to what stipulations for the protection of wild life should be inserted in leases, if they are issued." A memorandum from the Solicitor of the Interior Department to Under Secretary Davis dated May 30, 1956, reported that on December 1, 1955, there were 424 oil and gas lease offers for lands within the Kenai Range. According to the records of the Land Office at Anchorage, a total of 133 individuals and companies filed 703 applications for oil and gas leases within the Moose Range during the period 1953 to January 1, 1958. None of these applications or offers was, of course, rejected when it was filed; each was accepted, given priority according to its date of filing, and placed under suspension for the time being in accordance with one or another of the directives of the Bureau of Land Management.

The acceptance, rather than the rejection, of each was confirmation of the consistent position of the Government that the Range was at all times, up until January 8, 1958, open to oil and gas leasing.

In August, 1958, the Anchorage Land Office began issuing oil and gas leases on lands in the northern half of the Moose Range. Applications were adjudicated on the basis of the priority of time of filing and, since many of the long-pending applications had already been given all but final processing, in accordance with the March 30, 1956, instructions, leases were quickly issued thereon. New unit plans of operation were promptly approved and additional drilling was permitted to proceed thereunder. All told, 433 leases covering over 900,000 acres were issued pursuant to applications filed prior to 1958.

By October, 1960, a pipe line running from the producing area of the Moose Range to the ocean was completed, and the Secretary has accepted since then substantial royalties in accordance with the terms of the leases covering the producing areas. Ninety per cent of the royalties has been distributed annually to the State of Alaska and the remaining 10 per cent has been paid into the general funds of the United States.

In all administrative proceedings subsequent to August 2, 1958, the Secretary also uniformly treated the Moose Range as having been open to oil and gas leasing since the issuance of E.O. 8979. In addition to denying the claims of respondents on the ground that others were the first qualified applicants, the Secretary in his decision in *Richard K. Todd* (1961) 68 I.D. 291, reaffirmed that the Moose Range had been open to leasing prior to August 2, 1958, and held that his broad discretionary powers to withhold leases when the national interest so required justified the rejection of applications for leases on the southern half of the Moose Range. Subsequently, the Secretary ruled that the leases issued on the northern half of the Range were entitled to five-year extensions of their primary terms under the Mineral Leasing Act (30 U.S.C 226-1) because the Moose Range was not "withdrawn from leasing" under the statute.

In all its orders, regulations and actions from 1941 down to the present, the Government has consistently treated the Moose Range as open to leasing. This uniform and long continued construction of the orders creating and governing the Range is entitled to great weight,

and should not be disturbed unless it is plainly wrong, or clearly unlawful—which, of course, it is not.

Power Reactor Co. v. Electricians (1961) 367 U.S. 396, 408;

F.T.C. v. Mandel Brothers (1959) 359 U.S. 385, 391;

Okanogan Indians v. United States (the Pocket Veto case) (1929) 279 U.S. 655, 689;

Universal Battery Co. v. United States (1930) 281 U.S. 580, 583;

Lucas v. American Code Co. (1930) 280 U.S. 445, 449.

III

THE SECRETARY'S CONSTRUCTION OF THE ORDERS CREATING AND GOVERNING THE MOOSE RANGE HAS BEEN RATIFIED AND CONFIRMED BY CONGRESS AND THE PRESIDENT.

A. Congress has repeatedly confirmed the Secretary's construction of the governing orders as leaving the Moose Range open to leasing.

When bills were introduced in Congress at the beginning of 1956 to restrict oil and gas leasing of wildlife refuges, the House Committee on Merchant Marine & Fisheries and the Subcommittee on Merchant Marine & Fisheries of the Senate Committee on Interstate and Foreign Commerce held extensive hearings thereon.

During these hearings both Committees were advised that 21 oil and gas leases had been issued on lands within the Kenai National Moose Range in 1954 and 1955. It was the Government's position, which both Committees accepted, that the lands in question were open to leasing,

within the discretion of the Secretary of the Interior, and that the only question involved was whether, in the exercise of this discretion, the Secretary should have issued these leases or should issue any more such leases. His authority to do so was never questioned.

At the hearings thorough consideration was given to the question whether the proposed bill would restrict the authority of the Secretary to issue oil and gas leases within national wildlife refuges. The bill restricted the power of the Secretary of Interior to "dispose of" such areas, but various Government officials not only asserted that a "disposition" did not include a grant of oil or gas leases,[31] but also asserted that no secondary use of national wildlife refuges was restricted by such language.[32]

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[31]The following discussion took place between L. E. Hoffman, minerals staff officer, Bureau of Land Management and Representative Bonner:

> "*The Chairman* [Bonner]. There is a proposed amendment to the bill which the committee has at the present time, which will apply to leasing on lands owned and operated by the Fish and Wildlife Service.
>
> "*Mr. Hoffman.* Without such amendment, I don't think this would prevent leasing. This would prevent the sale or turning over of refuge lands, *but leasing is not a disposition.* The Government maintains fee-simple title in the lands. It maintains control over the leased area. It is merely the right to extract particular minerals, such as oil or gas from the land, on the payment of a royalty to the Government, or the Government may take the proportionate share of the oil in kind."

Hearings (January 19-20, and February 20-21, 1956) before the Committee on Merchant Marine & Fisheries on H.R. 5306, H.R. 6723, and H. R. 8839 (Protection of National Wildlife Refuges), 84th Cong., 2d Sess., p. 98.

[32]See generally, Statement of Donald Chaney, Acting Assistant Solicitor, Fish & Wildlife Service, Hearings (February 23-24, 1956) before a Subcommittee of the Committee on Interstate and Foreign Commerce on S.2101 (Protection of National Wildlife Refuges) 84th Cong., 2d Sess., pp. 66-69.

The result of this contention was a proposed amendment to the bill and to the Mineral Leasing Act which would have specifically restricted the power of the Secretary to issue oil and gas leases within refuges.

Neither committee reported favorably on the pending bills[33] proposing amendment of the Mineral Leasing Act. However, the House Committee submitted a report (No. 1941, 84th Cong., 2d Sess.), stating that it had been decided to try, for an experimental period of time, an arrangement between the Secretary of the Interior and the Committee, under which each proposed alienation or relinquishment of any interest the Fish & Wildlife Service had in lands under its jurisdiction would be submitted to the Committee, and the Committee would have 60 days to indicate its approval or disapproval of the action contemplated. The resolution of the issue in this manner clearly demonstrates that Congress recognized the an-

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[33]This was consistent with long-standing Congressional policy. Congress knew full well that many bird refuges had been created on the public domain by Executive Order (See *United States v. Midwest Oil Co.* (1915) 236 U.S. 459), but it did not, in 1920 or at any time thereafter, exclude refuges from the lands covered by the Mineral Leasing Act. Also, Congress knew that Wildlife refuge lands purchased by the United States would be subject to oil and gas leasing under the Mineral Leasing Act for Acquired Lands (61 Stat. 913; 30 U.S.C. 351) adopted in 1947. In 1952 the Chairman of the House Interior and Insular Affairs Committee stated (House Report No. 2511, 82d Cong., 2d Sess., footnote 2 on p. 1), "Public lands withdrawn for wildlife refuges are not subject to most public land laws except the mineral leasing and right-of-way laws." The Multiple Mineral Development Act of 1954 (68 Stat. 708; 30 U.S.C. 521), which amended both the Mineral Leasing Act and the Atomic Energy Act, restricted the authority of the Atomic Energy Commission to issue leases for source materials on wildlife refuges; an identical amendment to the Mineral Leasing Act restricting the authority of the Secretary of the Interior to issue oil and gas leases on such refuges was rejected. See Cong. Rec., Feb. 2, 1956, p. 1929.

thority of the Secretary of the Interior to issue oil and gas leases and that the sole concern of the Committee was sharing the Secretary's discretionary authority.

Pursuant to that arrangement, the House Committee on Merchant Marine & Fisheries held a public hearing on July 20 and 25, 1956, on a proposal from the Fish & Wildlife Service for the issuance of oil and gas leases on approximately 70,000 acres of land in the northern half of the Moose Range for which lease applications had been filed in 1954 by amicus Richfield Oil Corporation and a number of individuals.[34] The proposal contemplated that the leases would be subject to the Swanson River Unit plan of operation, which was approved by the Bureau of Land Management, the Geological Survey and the Fish & Wildlife Service, all branches of the Department of the Interior. A special "Operating Program" was also negotiated between Richfield and the Fish & Wildlife Service to insure full protection of wildlife values.

At the hearing a spokesman for the National Wildlife Federation argued that E.O. 8979 precluded the issuance of oil and gas leases in the Moose Range (see p. 4 of Statement by Charles H. Callison, following p. 15 of Transcript). On July 25, 1956, the Chairman of the Committee advised the Director of the Fish & Wildlife Service that the Committee unanimously concluded that issuance of the leases would not be detrimental to the wildlife

[34]See Transcript of Hearings before House Committee on Merchant Marine & Fisheries, July 20 and 25, 1956, "Lease of Portions of Kenai National Moose Range".

values of the Moose Range, and that the Committee concurred in the proposal to issue the leases.[35]

Following the Committee's approval the leases were issued, an exploratory well was drilled, and oil was discovered in commercial quantities in July, 1957. A title defect in these leases then became extremely important, and the leases came under further Congressional review. The defect lay in the fact that the Secretary had authority to issue leases on dry lands, but not on lands beneath inland navigable waters in Alaska. Hence the Secretary of the Interior asked Congress for authority to issue leases on Alaskan water bottoms, and to add to the leases already issued in Alaska and to applications pending in Alaska the water bottoms within their boundaries. In the hearings before the Senate Committee on Interior and Insular Affairs on the proposed bill, Mr. Gordon Goodwin, attorney for amicus Richfield Oil Corporation, testified on May 14, 1958:[36]

> "Mr. Goodwin. Well, we have pending, have had for 2 or 3 or more years, application for leases in the Kenai moose range, and a few leases were issued in there, and that is where the discovery was made."

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[35]The Chairman's letter advised that Mr. Bartlett, the delegate from Alaska, joined with representatives of the Interior Department in testifying that there would be no detriment to the wildlife in the area. Mr. Bartlett obtained from the Deputy Solicitor of the Interior Department and presented to the Committee an opinion that E.O. 8979 did not prohibit leasing of lands in the Moose Range for oil and gas purposes (see Transcript of Hearings, pp. 29-30A; and Appendix, p. iv).

[36]Hearings before Senate Committee on Interior and Insular Affairs, 85th Cong., 2d Sess., on H.R. 8054, p. 77.

The Senate Committee reported favorably on the proposed bill, saying:[37]

> "In Alaska, there is at the present time, only one area which is now subject to the Mineral Leasing Act where oil and gas is known to exist in paying quantities, this being on the Kenai Peninsula as previously described. If prior to the effective date of this act, the producing structure on the Kenai is defined, then the holders of upland leases in such areas might be forced to compete for areas beneath adjacent lakes and streams. The committee felt that this result would work to the disadvantage of those lessees and developers who have gone ahead and developed this area * * *."

The Congress subsequently passed, and on June 3, 1958, the President approved, the bill which was known as the Alaska Submerged Lands Act (72 Stat. 322; 48 U.S.C. 456 and 30 U.S.C. 251). In so doing the Congress clearly confirmed and ratified the issuance of the leases within the Kenai Moose Range on which the discovery by amicus Richfield Oil Corporation had been made and confirmed and ratified the construction of the Moose Range orders by the Secretary of the Interior under which he had issued those leases.

Moreover, in section 3 of the Alaska Submerged Lands Act Congress provided that all moneys received from the sale of, or as bonus, royalty and rental under, any leases issued pursuant to the Act should be paid into the Treasury of the United States, and that the Secretary of the Treasury should pay 90 per cent of such moneys

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[37]Senate Report No. 1720, 85th Cong., 2d Sess., p. 5.

to the Territory of Alaska. Having been informed that oil and gas leases had been issued in the Kenai Moose Range and that a discovery had been made thereon, this was tantamount to Congressional appropriation of 90 per cent of the royalties received from this production to the Territory of Alaska.

Lastly, in section 10 of the Alaska Submerged Lands Act, Congress provided that the annual lease rentals in leases on lands in the Territory of Alaska not within any known geological structure, and the royalty payments for production of oil or gas from such lands, should be identical with those prescribed for such leases covering similar lands in the states of the United States, except that leases issued pursuant to offers which were filed prior to and were pending on May 3, 1958, should require a first-year rental payment of 25 cents per acre. The pending applications on the Moose Range which had been brought to the specific attention of the Senate Committee by Mr. Gordon Goodwin were, of course, all filed prior to that date. In both the appropriation of 90 per cent of rentals and royalties to the Territory of Alaska and the retention of the 25 cent per acre first-year rental for leases issued on offers prior to May 3, 1958, Congress again confirmed and ratified the Secretary's construction of the Moose Range orders under which he had accepted applications for leases within the Moose Range, and issued leases within the Range prior to that time.

Thus, on three separate occasions—in rejecting the proposed wildlife bills early in 1956, in the hearings leading to the issuance of the Swanson River Unit leases later in 1956, and in the passage of the Alaska Submerged Lands

Act—Congress gave recognition to the fact that the Moose Range was open to leasing throughout the period of time during which the Court of Appeals said it was closed to leasing. In so doing it ratified and confirmed—before respondents filed their application herein in suit—the issuance of the leases within the Moose Range which the Court of Appeals has said are nullities.

See:

Power Reactor Co. v. Electricians (1961) 367 U.S. 396, 409;

Ivanhoe Irrig. Dist. v. McCracken (1958) 357 U.S. 275, 293;

Fleming v. Mohawk Wrecking & Lumber Co. (1947) 331 U.S. 111, 116; and

Brooks v. Dewar (1941) 313 U.S. 354.

B. The President ratified and confirmed the Secretary's construction of E.O. 8979 and P.L.O. 487 as leaving the Range open to leasing.

In his Annual Report to the President for the fiscal year ended June 30, 1953, the Secretary of the Interior said (p. 65):

> "Of outstanding importance during fiscal 1953 was the increased interest in the development of minerals in Alaska. The geographical range of oil and gas filings in this Territory are of considerable interest. A large group have picked the areas of the Wide Bay, Cold Bay, Iniskin Bay, and from Kenai to Homer in the Kenai Peninsula."

Kenai, on Cook Inlet, is located right in the middle of the Kenai Moose Range.

In his Annual Report for the fiscal year ended June 30, 1955, the Governor of Alaska said (pp. 60-61):

> "Residents of Alaska and major oil companies have continued to file lease applications and send exploratory parties into various parts of the Territory. The Kenai Moose Reserve on the Kenai Peninsula is covered with 325 lease applications awaiting decision of the Secretary of the Interior as to what stipulations for the protection of wild life should be inserted in leases, if they are issued."[38]

In his Annual Report for the fiscal year ended 1957, the Secretary of the Interior said (p. 356):

> "Shortly after the close of the fiscal year the Richfield Corp. brought in a well in the Kenai Peninsula."

And in his Report for the fiscal year ending 1957, the Governor of Alaska said (p. 88):

> "At the time of this writing, Richfield Oil Co. had announced that their first exploratory well in the Swanson River area on the Kenai Peninsula has located a very promising stratum of oil sand. Hopes are high that further drilling will delineate a sizeable oil structure in the area. The oil was drilled on a federal lease and as could be expected, it was followed by an unprecedented rush of oil and gas filings in the Anchorage Land Office."

On June 3, 1958, the President, having been informed of the leasing activity and discovery of oil within the Kenai Moose Range by the reports referred to above, approved and signed the Alaska Submerged Lands Act (72 Stat. 322; 48 U.S.C. 456 and 30 U.S.C. 251), which added

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[38]See 48 U.S.C. 64.

to the leases issued and applications filed in Alaska the water bottoms within their boundaries. In so doing, the President ratified and confirmed the Secretary of the Interior's construction of E.O. 8979 and P.L.O. 487 as leaving the Range open to leasing.

See *Peters v. Hobby* (1955) 349 U.S. 331.

IV

INDISPENSABLE PARTIES WERE NOT JOINED IN THIS SUIT.

Amici urge that this case be decided on the merits, as further delay in settling the titles to the oil and gas leases in the Kenai Moose Range will be extremely detrimental to the interests of all concerned, including the State of Alaska. Amici wish, however, to bring this Court's attention to the serious defect in the administration of justice presented by their absence as parties in this case.[39]

As stated above, amici hold oil and gas leases on the identical lands which respondents seek to have leased to them. Necessarily, the respondents seek to have the leases of amici canceled by the Secretary. Despite this fact, none of amici and none of those holding overriding royalties or other interests in the leases of amici were named as parties to or given any notice, formal or otherwise, of

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[39]The absence of indispensable parties may and should be raised by the trial court *sua sponte* and when not so raised may be raised by the reviewing court (*Hooey v. Wilson* (1870) 9 Wall. (76 U.S.) 501; *Brown v. Christman* (D.C.Cir. 1942) 126 F.2d 625, 631-632; *Flynn v. Brooks* (D.C.Cir. 1939) 105 F.2d 766, 767-768).

the filing or pendency of this action. In fact, none of the amici learned of the existence of the suit until after the decision of the Court of Appeals herein was handed down on September 19, 1963.[40]

The Court of Appeals said in its opinion that all existing leases within the Moose Range issued on applications filed prior to January 8, 1958, are "nullities," and ordered the Secretary to issue leases to the respondents, acting presumably under the rule laid down by that court in *Barash v. Seaton* (D.C. Cir. 1958) 256 F.2d 714. There the court held that the holder of a Federal oil and gas lease is not an indispensable party in a suit by a junior applicant seeking to compel the Secretary to issue a lease to him. On remand the District Court directed the Secretary to issue leases to the junior applicant.[41] The Secretary promptly thereafter canceled the

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[40] Amicus Richfield Oil Corporation did participate in the administrative proceedings in the Interior Department, but was given no notice of and had no knowledge of the filing of the suit.

[41] In *Barash* the District Court then filed a memorandum saying (66 I.D. 12):

> "From the standpoint of the Court of Appeals, as indicated in its opinion (No. 14069, decided April 25, 1958), it was held that The Texas Company was not an indispensable party, and then the Court went on to say: '. . . we do not now order cancellation of any of the Secretary's leasing agreements with The Texas Company.' (p. 7) Neither does this Court. Whether or not the order as signed will have that effect in the circumstances may well be so, but that result is not ordered for the very reason that the Court of Appeals, in the circumstances, refused to dispose of the matter.
>
> "It is unfortunate that the Court left the case in this posture, and what the 'further proceedings' consistent with this opinion is, is not clear either from the point of view of this Court or that of counsel. I leave it in the posture in which I find it."

existing lease as a necessary step in compliance with the order of the District Court. Accordingly, the plain legal effect of the Court's decision in the *Barash* case, as construed by the District Court and the Secretary of the Interior, was to cancel the lease of the party not before the Court.

It is respectfully submitted that the ultimate result of the *Barash* case was at fundamental variance with the oft-quoted injunction of this Court in *Shields et al. v. Barrow* (1854) 17 How. (58 U.S.) 129, which defined indispensable parties as (p. 139):

> "Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience."

and held that (pp. 140-141):

> "* * * a circuit court can make no decree affecting the rights of an absent person, and can make no decree between the parties before it, which so far involves or depends upon the rights of an absent person, that complete and final justice cannot be done between the parties to the suit without affecting those rights."

In *Barash* the Court of Appeals relied on *Work v. Louisiana* (1925) 269 U.S. 250. The *Work* case does not support the *Barash* ruling. *Work* held only that homestead entrymen are not necessary parties to a suit by a state to enjoin the Secretary of the Interior from rejecting its claim to certain lands on the ground that the state, as a condition precedent, was required to show that the

lands were not mineral in character. Even if the state had won its limited point, it still would not have established any right to the lands as against the absent entrymen.

Brady v. Work (1924) 263 U.S. 435, is controlling authority. In that case the junior applicant sought to enjoin the Secretary from issuing a patent to a homesteader. In the administrative proceeding the Secretary had held that the homesteader and not the junior applicant was entitled to the land and, thus, the patent. It is clear from the opinion that since the homesteader had been awarded the land, the Court could not act on the claim of the junior applicant without, in fact, adjudicating the homesteader's title. In this situation the homesteader was an indispensable party and the Court stated (263 U.S. at 437).

> "Clearly the controversy between the plaintiff and those officers [Secretary and Land Office Manager] involving the granting of a patent to her can not be settled without her presence in court. * * * She is entitled to be heard. Inability to secure service on her because she lives in Arizona can not dispense with the necessity of making her a party."

The soundness of the indispensable party rule is well illustrated by the fact that although respondents cannot possibly establish any right to leases without at the same time attacking the leases held by amici, the Secretary of the Interior is not the representative of his lessees and owes them no duty to represent them in actions such as this.[42] The Department of Justice pointed out to the court below that "one of the difficulties always presented is

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[42] *Litchfield v. Register and Receiver* (1869) 9 Wall. (76 U.S.) 575.

that we consider it inappropriate for us, on behalf of the Secretary, to urge facts or equities which may favor such a lessee." Thus amici have, in practical effect, been deprived of a number of their leases without ever having had their day in court.

See:

Texas v. Interstate Com. Comm. (1922) 258 U.S. 158;

Calcote v. Texas Pac. Coal & Oil Co. (5 Cir. 1946) 157 F.2d 216;

Alaska Freight Lines v. Weeks (D.D.C. 1955) 18 F.R.D. 64.

We submit that the rule of the *Barash* case is contrary to the adversary principle of our judicial system and should be abrogated.[43]

[43]When the *Barash* case was begun, one suing the Secretary of the Interior had to bring suit against him in the District of Columbia (see *Stroud v. Benson* (4 Cir. 1958) 254 F.2d 448, certiorari denied (1958) 358 U.S. 817), where the holder of an existing lease might not be amenable to service. In 1962, 28 U.S.C. 1391 was amended to permit action against Government officials to be brought outside the District of Columbia (76 Stat. 744).

CONCLUSION

The President's 1941 order creating the Moose Range and the Secretary's 1948 order supplementing that order did not close the Range to oil and gas leasing.

The Secretary consistently treated the Range as open to leasing, made known to all that he did so, and treated all applicants for leases therein alike, under governing law.

The Secretary's construction of E.O. 8979 and P.L.O. 487 as permitting the acceptance of applications and the issuance of leases was correct, and has been ratified and confirmed by Congress and the President.

The leases issued within the Moose Range on applications filed prior to January 8, 1958, were and are valid. Respondents therefore are not the first qualified applicants for leases on the lands they seek, and their applications were properly rejected by the Secretary on this ground.

The judgment of the Court of Appeals should be reversed, and the judgment of the District Court affirmed.

Respectfully submitted,

ABE FORTAS,
JOSEPH A. BALL,
GORDON A. GOODWIN,
Attorneys for Richfield Oil Corporation.

FRANCIS R. KIRKHAM,
TURNER H. MCBAINE,
CLARK M. CLIFFORD,
Attorneys for Standard Oil Company of California.

(Appendix Follows)

Appendix

Serial No.	Date of Filing	Description (Unsurveyed Sections, Township and Range, Seward Meridian)	Name of Applicant
UNACCEPTABLE FILING PERIOD (January 8, 1958 - August 14, 1958)			
043276	5-15-58	Secs. 1, 2, 11 and 12, T. 6 N., R. 9 W.	Christine Fleischer
043277	"	Secs. 3, 4, 9 and 10, T. 6 N., R. 9 W.	James G. Carlson
043018	4-28-58	Secs. 27, 28, 33 and 34, T. 6 N., R. 9 W.	Harry B. Cockrum
043019	"	Secs. 29, 30, 31 and 32, T. 6 N., R. 9 W.	Bailey E. Bell
043027	"	Secs. 25, 26, 35 and 36, T. 6 N., R. 9 W.	James K. Tallman
043028	"	Secs. 5, 6, 7 and 8, T. 6 N., R. 9 W.	Dr. James E. O'Malley
043054	"	Secs. 15, 16, 21 and 22, T. 6 N., R. 9 W.	Lars L. Johnson
043058	"	Secs. 13, 14, 23 and 24, T. 6 N., R. 9 W.	Dr. William O. Rabourn
043088	"	Secs. 17, 18, 19 and 20, T. 6 N., R. 9 W.	Dr. Michael F. Beirne
043090	"	Secs. 2, 3, 10 and 11, T. 6 N., R. 10 W.	Harry B. Cockrum
043092	"	Sec. 2, T. 5 N., R. 5 W.	Bailey E. Bell
MOOSE RANGE SIMULTANEOUS FILING PERIOD			
044842	8-14-58	Secs. 1, 2, 11 and 12, T. 6 N., R. 9 W.	Christine Fleischer
044843	"	Secs. 25, 26, 35 and 36, T. 6 N., R. 9 W.	James K. Tallman
044844	"	Secs. 25, 26, 35 and 36, T. 6 N., R. 10 W.	Alice P. Tallman
044845	"	Secs. 13, 14, 23 and 24, T. 6 N., R. 9 W.	Dr. William O. Rabourn
044846	"	Secs. 27, 28, 33 and 34, T. 6 N., R. 9 W.	Harry B. Cockrum
044847	"	Secs. 29, 30, 31 and 32, T. 6 N., R. 9 W.	Bailey E. Bell
044848	"	Secs. 3, 4, 9 and 10, T. 6 N., R. 9 W.	James G. Carlson
044849	"	Secs. 17, 18, 19 and 20, T. 6 N., R. 9 W.	Dr. Michael F. Beirne
044850	"	Secs. 5, 6, 7 and 8, T. 6 N., R. 9 W.	Dr. James E. O'Malley
045178	"	Secs. 9, 10, 11, 14, 16, 18, 19 and 36, T. 5 N., R. 11 W., S.M.	Waldo E. Coyle

United States Department of the Interior
Office of the Secretary
Washington 25, D. C.

June 13, 1958

Dear Mr. Bell:

Rev. Ofc. Asst. Secy—PLM

Thank you for the comments in your letter of May 19, relating to oil and gas leasing of lands in the Kenai National Moose Range in Alaska.

Since 1947 the oil and gas leasing regulations have provided for development of such mineral deposits on wildlife refuge lands only under certain conditions. On the basis of a study of these leasing procedures, the regulations were amended in December 1955 to exclude oil and gas leasing on certain wildlife areas and to establish adequate restrictions on such leasing in other areas administered for wildlife conservation purposes. The lands within the Kenai National Moose Range were included in the category classified as available for leasing.

However, in view of the fact that many wildlife areas were being administered on a cooperative basis by the Fish and Wildlife Service and other agencies as well as with State game commissions, further study of the entire situation was deemed advisable. The suspension of action on issuance of leases for lands administered for wildlife purposes, which had been in effect since 1953, was continued until further notice.

The regulations which were approved January 8, 1958, have been supplemented by special stipulations which will be a part of any lease issued for lands administered for wildlife purposes. The regulations of January 8 are enclosed for your information. Your attention is directed to the provisions of section 192.9(b)(3) which sets forth the leasing policy and procedure for lands in Alaska wildlife areas, including the Kenai National Moose Range.

While the order of 1953 suspended issuance of leases for lands within wildlife areas, it did not prohibit the filing of offers for such lands. Consequently, all offers filed for lands in the Kenai Moose Range prior to the approval of the regulations of January 8, 1958, have a priority of filing as of the date received in the Anchorage Land Office. Whether such offerors are qualified to receive a lease for the lands applied for will be determined at such time as the offers are reached for adjudication.

An agreement has been reached as to the lands in the Kenai Moose Range which will be closed to leasing. A map of the area showing the inviolate area and the area open to leasing will be published in the *Federal Register*, and ten days after its notation on the records of the Anchorage Land Office, offers will be accepted for the area open to leasing as provided in section 192.9(c) of the enclosed regulations. Offers received for these lands since the approval of the regulations and prior to the tenth day following publication and notation of the agreement will not be accepted for filing. Such offers will be returned to the offeror and will afford the offeror no priority of filing.

Copies of the press releases relating to the special stipulations and to the agreement affecting the Kenai Moose Range are enclosed for your information.

Sincerely yours,
(sgd) Roger Ernst
Assistant Secretary of the Interior

Mr. Bailey E. Bell
Bell, Sanders & Tallman
Attorneys at Law
Central Building
Anchorage, Alaska

Enclosures

United States Department of the Interior
Office of the Solicitor
Washington 25, D. C.

July 24, 1956

Hon. E. L. Bartlett
Delegate to Congress from Alaska
House Office Building
Washington 25, D. C.

My Dear Mr. Bartlett:

This is in reference to your recent inquiry as to whether or not lands in the Kenai National Moose Range of Alaska are subject to oil and gas leasing under the provisions of Executive Order No. 8979, dated December 16, 1941. Executive Order 8979 provides that "None of the • • • lands • • • shall be subject to settlement, location, sale, entry, or other disposition." Therefore, the executive order does not prohibit leasing of such lands on the Moose Range for oil and gas purposes in that a lease as such is not for the purpose of acquiring title to the lands and therefore is not included within the prohibitions.

This decision is in accord with an opinion rendered by the Solicitor of this department on September 30, 1921, wherein it was held that a reservation of lands of the United States from entry, location or other disposal under the laws of the United States did not remove the reserved lands from leasing under the Mineral Leasing Act. This decision of 1921 has been recently reaffirmed in the matter of Noel Teuscher, et al., decided May 31, 1955 (62 I.D. 210 at page 212), a copy of which is attached.

Sincerely yours,
Edmund T. Fritz
Deputy Solicitor

Enclosure